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AUG 23 1963

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 188

SAYLES FINISHING PLANTS, INC., *Appellant*,

v.

MARTIN J. TOOMEY, Tax Assessor of the Town of East Providence

Appeal from the Superior Court of the State of Rhode Island

BRIEF IN OPPOSITION TO THE MOTION TO DISMISS

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF IN OPPOSITION TO THE MOTION TO DISMISS

The quality of Assessor's Motion to Dismiss, hereinafter M/D, may be judged by the circumstance that he has begged rather than stated the question presented by this appeal, that in lieu of quoting the statute whose application is here challenged he has excised controlling words therefrom in the guise of paraphrasing it, and that he never once mentions the circumstance that, after a trial extending

over 57 trial days, the trial justice found as a fact that Taxpayer had been overassessed by over $1,173,000.

First. The question is not, as Assessor contends (M/D 1-2), whether the court below "decides that [the aggrieved taxpayer's] failure to comply with the procedure prescribed by the elected remedy deprived the Court of jurisdiction", it is whether the procedural requirements laid down for the first time by the court below, while the present proceeding was pending, were so unanticipated that Taxpayer was retroactively deprived of any meaningful hearing.

Assessor does not state the basic question presented, he simply avoids it.

Second. Assessor says (M/D 3), "Section 44-5-30 of the said statute provides that if, on trial, it shall appear that the taxpayer has omitted any property from his account, the assessor shall have judgment and costs for the full amount of the assessment." A similar statement appears at M/D 4.

The statute itself (R. I. Gen. Laws 1956, § 44-5-30, set forth in full at J. S. App. A19-A20) reads as follows:

> "If, however, on the trial of said petition it shall appear that the taxpayer has *fraudulently concealed or omitted* any property from his account, * * * the assessors shall have judgment and execution for their costs."

We have added the italics to emphasize that Assessor omits entirely the words "fraudulently concealed or"—and "fraudulently" as a matter of grammar modifies "concealed" as well as "omitted". Thus Assessor's version, far from paraphrasing the statute, materially alters its scope. Significantly enough, Assessor at the trial disclaimed any contention of fraud (Tr. 3460).

Third. These basic inaccuracies on Assessor's part having been exposed, we turn to his efforts to downgrade the substantiality of the Federal questions tendered by the present appeal. His essential contentions appear to be three in number:

1. Taxpayer cannot complain of any defects in the statutory remedy by way of petition in the Superior Court, inasmuch as it had an alternative statutory remedy by way of appeal to the board of tax assessment review for East Providence.

2. In any event, the statutory remedy under the statute first cited provided due process safeguards, and Taxpayer cannot complain since it did not follow the prescribed procedures.

3. The Rhode Island court's construction of the Rhode Island statute respecting remedies for an aggrieved taxpayer is binding on this Court.

In the context of the present record, none of these contentions is tenable, as we can briefly demonstrate.

I. Since the Supreme Court of Rhode Island did not rest its decision on the existence of an alternative State remedy, but decided the Federal question in the case, Assessor cannot defeat review here by putting forward that asserted remedy as a possible non-Federal ground to support the result reached below

Assessor appears to assert (M/D 7-9, 13) that inasmuch as Taxpayer had a statutory remedy under R. I. Public Laws 1949, c. 2296 (M/D 15-17), which provided for an appeal to the East Providence board of tax assessment review without any requirement for filing an account, Taxpayer cannot now challenge the sufficiency under the Due Process Clause of the other statutory remedy, namely, the petition in the Superior Court which is conditioned on such filing, provided by R. I. Gen. Laws 1956, §§ 44-5-15 and 16 (J.S. App. 16A-17A).

Otherwise stated, Assessor contends that the judgment below could be supported on an adequate non-Federal ground.

Nothing in the opinion of the Rhode Island Supreme Court, however, so much as mentions the alternative remedy (J.S. App. A1-A14). Consequently this Court has jurisdiction to review the Federal questions tendered, since a State judgment cannot be said to rest on an adequate State ground where such ground was no part of the decision. *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192, 197, note 1; *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95, 98; *International Steel Co.* v. *National Surety Co.*, 297 U.S. 657, 666; *Grayson* v. *Harris*, 267 U.S. 352, 358; *Rogers* v. *Hennepin County*, 240 U.S. 184, 187-189.

As the Court said in *Grayson* v. *Harris*, *supra*, 267 U.S. at 358,

> "The rule that, when the decision of a state court may rest upon a non-Federal ground adequate to support it, this court will not take jurisdiction to determine the Federal question, has no application where, as here, the non-Federal ground might have been considered by the state court, but was not."

Again, in *Indiana ex rel. Anderson* v. *Brand*, *supra*, 303 U.S. at 98, the Court said:

> "Where the state court does not decide against a petitioner or appellant upon an independent state ground, but deeming the federal question to be before it, actually entertains and decides that question adversely to the federal right asserted, this Court has jurisdiction to review the judgment if, as here, it is a final judgment. We cannot refuse jurisdiction because the state court might have based its decision, consistently with the record, upon an independent and adequate non-federal ground."

Accordingly, it is unnecessary to consider the adequacy of the alternative remedy, which of course could not be

availed of now, as it was limited by its terms to a 60-day period following publication of the assessment roll. Sec. 3 of R. I. Public Laws 1949, c. 2296 (M/D 16).

II. The vice of the decision below was that, by retroactively imposing new requirements in two respects for the account that was a prerequisite to a hearing on the quantum of the assessment, it deprived Taxpayer of due process of law in the primary sense of a right to be heard

We said in our Jurisdictional Statement, after a detailed review of Rhode Island decisions and rescripts, and the course of Rhode Island tax remedy legislation over many years (J.S. 17),

> "On any basis—the successive relaxations in the statute, the decided cases, the practice as reflected in the rescripts of the trial court—on any basis or indeed on any combination of bases, not only was the *Ewing* return sufficient [*Ewing* v. *Tax Assessors of the Town of Jamestown*, 176 A. 2d 69; J.S. App. A23-A27], but, *a fortiori*, it was not law in Rhode Island that a deficiency in an account in respect of personalty barred relief as to an established overassessment of realty."

Assessor counters by saying (M/D 10) that

> "the Supreme Court of Rhode Island in a long line of cases from an early date has followed without exception the proposition that any taxpayer who fails to file an account of *all of his ratable property* and otherwise comply with the statute is not entitled to any relief under the provisions of Section 44-5-26." [Italics in original.]

In view of the development of the statute, detailed at J.S. 14-16, which ameliorated the harsh early rule of *Clarke* v. *Tinkham*, 20 R. I. 790, 38 Atl. 926, first by penalizing only wilful omissions, and then by barring only fraudulent omissions, the italicized portion of Assessor's statement is demonstrably incorrect.

As in the case of his inaccurate rendering of the statute (*supra*, p. 2), Assessor has omitted the key words; his argument, like his paraphrase, wholly fails to consider the statutory ameliorations effected over the years.

Nor does Assessor's argument correctly reflect the state of the Rhode Island decisional law at the time Taxpayer filed its account; not a single one of the cases he cites (M/D 10-11) would have led any lawyer well versed in the field to have anticipated the rule of the *Ewing* case. Thus, four of Assessor's cases antedate the statutory amendment that first penalized only wilful omissions in an account,[1] a circumstance that quite deprives them of authority here, where "wilfully" had given place to "fraudulently" as the only omission that would bar a taxpayer from his remedy. In another case, no account whatever was filed,[2] obviously not the situation here. Three other decisions relied on by Assessor seem completely irrelevant to any possible issue in the present case,[3] while his final citation, *In re Newport Reading Room*, 21 R. I. 440, 44 Atl. 511, where an account was filed and relief was given, assuredly did not foreshadow the *Ewing* case

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[1] *Coventry Company* v. *The Assessors of Taxes*, 16 R. I. 240, 14 Atl. 877; *Tripp* v. *Torrey*, 17 R. I. 359, 22 Atl. 278; *Narragansett Pier Co.* v. *Assessors*, 17 R. I. 452, 23 Atl. 11; *Clarke* v. *Tinkham*, 20 R. I. 790, 38 Atl. 926. All that the *Narragansett Pier* case involved was a failure to have the account sworn to before the proper officer. No such deficiency appears or is asserted in the present case.

[2] *Bishop* v. *Tax Assessors, Newport*, 47 R. I. 351, 133 Atl. 342.

[3] *Quimby* v. *Wood*, 19 R. I. 571, 35 Atl. 149 (entire levy cannot be set aside by injunction in the circumstances); *Stone* v. *Norris*, 40 R. I. 477, 101 Atl. 428 (*quo warranto;* had councilman been properly elected by sufficient personal property voters); *Merchants &c. Warehouse Co.* v. *Clerke*, 43 R. I. 37, 110 Atl. 380 (taxability of bailee in respect of bailed property; held illegal, hence relief given even though no account filed).

more than 60 years later, following further extensive statutory changes.

Consequently, all of the decisions after the insertion of "wilfully" into the statute in 1896 make it plain that in the present case the court below retroactively imposed two new requirements, which could not possibly have been anticipated prior to the *Ewing* case, decided during the pendency of this one in the trial court.

First, the court below for the first time, and under a statute that had been progessively relaxed over the years, imposed as a condition precedent to review of a tax assessment on real estate an inventory of Taxpayer's personal property in such detail as would be appropriate in a fiduciary's accounting or in a schedule of losses to be submitted to an insurer—and this in a contest where the assessment on the personal property, by common consent of both parties, was not in dispute.[4]

Second, the court below, in the face of an earlier decision that water rights are not independently taxable, held that a failure to list water rights appurtenant to real estate that was duly listed was a vitiating omission which barred relief in respect of assessments on other real estate. It reached this result on the ground that the account requires "such sufficiency in the separation and description of the various parcels of real and personal property as to be of assistance to the assessor in assessing a tax against each such parcel" (J.S. App. A10)—in a case where the tax records themselves disclosed the existence of the appurtenant water rights and where the particular parcels

[4] Assessor argues (M/D 5, 8) that Taxpayer was guilty of omissions in failing to particularize the various kinds of fixtures that R. I. Gen. Laws 1956, § 44-4-3 (M/D 5, note 6) declares to be realty. It seems sufficient to point out that nowhere in the opinion of the court below (J. S. App. A1-A11) is there any finding that Taxpayer omitted anything, as distinguished from not sufficiently particularizing what was listed.

involved had been assessed at the precise value returned by Taxpayer. See J.S. 9-10 for the record references.[5]

As we said (J.S. 14), if these tortured constructions of the statute had been made as an original proposition, then, since the Rhode court has undoubted authority to declare the meaning of a Rhode Island statute, no Federal question (except possibly as to vagueness, see J.S. 19) would have been open to one who had filed an account. But, as we also said, the statute was not so construed as an original proposition; it was given an unexpected construction that could not have been anticipated, and that in fact deprived Taxpayer of any meaningful hearing.

For, as we further pointed out (J.S. 19-21), under the statute as it stood when Taxpayer filed his account the only hearing provided was that in the Superior Court; and we showed in detail why the statements in the opinion below (J.S. App. A9, quoted with obvious relish at M/D 8-9), to the effect that Taxpayer had been legislatively provided a hearing before the assessors, do not survive examination of the statute, which indeed that opinion did not set out in full. Detailed references appear at J.S. 19-21.

The net of the foregoing is that the court below, by retroactively imposing new and unexpected requirements for the account which is the prerequisite to any hearing, has deprived Taxpayer of its right to be heard, in violation of the Due Process Clause of the Fourteenth Amendment. We submit that on this record such a contention presents a most substantial Federal question.

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[5] We have pointed out (J.S. 23) that while the court below did not emphasize the water rights point as strongly as did the Superior Court, the question was in the case and should be decided lest Taxpayer be required to take a second appeal. Assessor appears to agree, as he places considerable stress on Taxpayer's failure to list its appurtenant water rights (M/D 3, 4-5, 8).

III. The Brinkerhoff-Faris and Central of Georgia cases require reversal here

In our view, *Brinkerhoff-Faris Co.* v. *Hill*, 281 U.S. 673, and *Central of Georgia Ry.* v. *Wright*, 207 U.S. 127, both require reversal of the judgment below.

First. In the *Brinkerhoff-Faris* case, a taxpayer sued to enjoin collection of a tax, there being under the State's decisional law no administrative remedy for contesting the assessment. On appeal, the highest Court of the State overruled its decision which had held that no administrative remedy existed, and on that footing directed dismissal of the suit for injunction—though by then the administrative remedy was out of time. This Court, speaking through Mr. Justice Brandeis, held that since the effect of the State court's ruling was that a timely judicial remedy had been rendered unavailable through the retroactive creation of a new administrative remedy for which the taxpayer was out of time, the taxpayer had been deprived of a hearing in violation of Due Process of Law.

That, we submit, is precisely this case.

Second. In the *Central of Georgia* case, the State statutes provided that a taxpayer must return all of its property, whether fairly contestable or not, upon pain of an *ex parte* valuation that was conclusive in the absence of official fraud or corruption. The taxpayer did not return certain shares of stock, the taxability of which was doubtful and had indeed been much litigated. This Court held, unanimously, that to subject the taxpayer to an non-reviewable *ex parte* assessment because of its failure to return the shares of stock as taxable property amounted in those circumstances to a denial of Due Process of Law.

Again, this is precisely the present case. Certainly in view of *Slatersville Finishing Co.* v. *Greene*, 40 R. I. 410, 418, 101 Atl. 226, 229, and its holding that water rights were not independently taxable, the separate taxability

of Taxpayer's appurtenant water rights was, at an irreducible minimum, "fairly contestable" (207 U.S. at 141). Similarly, in view of the progressive relaxations of Rhode Island's tax remedy statute (J.S. 14-18), whether an itemized inventory of personal property was a prerequisite to relief in respect of an overassessment of real property was also, viewing the matter most unfavorably to Taxpayer, "fairly contestable." For, as we have shown (J.S. 14-18 and Point II, *supra*), there was no such requirement under the amended statute until it was imposed in the *Ewing* case, decided during the pendency of the present proceeding.

We submit, therefore, that the *Central of Georgia* and *Brinkerhoff-Faris* cases here require reversal of the judgment below. Here, as in both of those cases, Taxpayer has been deprived of that Due Process of Law which adjudges upon notice and opportunity to be heard.

CONCLUSION

For the foregoing additional reasons, it is respectfully submitted that this Court should note probable jurisdiction of the present appeal.

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AUGUST 1963.